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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

CORIO, INC.,
Plaintiff and Respondent,
v.
LIVEPERSON, INC.,
Defendant and Appellant.

A105136

(San Francisco County
Super. Ct. No. CPF 3503606)

In February 2000, appellant LivePerson and respondent Corio entered into a software hosting agreement under which LivePerson was to pay Corio a minimum monthly fee for its services. When LivePerson stopped paying the required monthly fees, Corio demanded arbitration under a provision of the hosting agreement. The arbitrator awarded \$1,115,440 in damages, plus prejudgment interest in the amount of \$216,191 to Corio. As requested by Corio, the trial court confirmed the arbitrator's decision in all respects. LivePerson timely appealed the trial court's confirmation of the arbitrator's decision. We affirm.

I. BACKGROUND

A. The Agreement.

The parties' agreement was to remain in effect for a term of 36 months, and for each of those months, LivePerson was to pay Corio a minimum monthly fee of \$33,550. In the event of nonpayment by LivePerson, paragraph 8.1, subdivision (a) of the agreement gave Corio the right to "declare all sums due and to become due hereunder, immediately payable." Paragraph 9.1 limited the parties' liability and provided in part

“IN NO EVENT SHALL EITHER PARTY . . . HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY LOST PROFITS OR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, OR FOR ANY INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES. . . .” Paragraph 11.7 provided that the parties would submit “any dispute or controversy arising out of or relating to any interpretation, construction, performance, or breach of [the] Agreement” to arbitration, which was to be conducted “in accordance with the rules then in effect of the American Arbitration Association” (AAA)” and which would be “final, conclusive, and binding on the parties to the arbitration.” Finally, the agreement specified that it “shall be governed by and construed in accordance with the laws of the State of California.”

B. LivePerson’s Breach.

In early 2001 LivePerson, alleging that Corio had failed to provide the services it had promised, stopped paying the monthly fees due under its agreement with Corio. Between February 2001 and September 2001, Corio sent five letters to LivePerson, warning that the contract would be terminated and all fees “due and to become due” under the contract would be demanded under paragraph 8.1 of the hosting agreement if LivePerson did not cure its default. Finally, on September 21, 2001, Corio sent LivePerson a letter that terminated the parties’ contract and demanded “a minimum of approximately \$1,104,069 for past due amounts due and minimum payment obligations.”

C. The Arbitration.

In accordance with a provision in the hosting agreement between the parties, Corio demanded arbitration in November 2001. On July 23, 2003, the arbitrator issued an interim award, in which he awarded Corio \$1,115,440 as well as prejudgment interest in an amount to be determined in a separate proceeding. On September 12, 2003, he issued a final award, in which he awarded an additional \$216,191 in interest (plus \$305.60 per day between August 29, 2003, and entry of judgment) to Corio.

D. The Trial Court’s Confirmation.

LivePerson opposed Corio’s request to have the arbitrator’s award confirmed by the trial court. Specifically, LivePerson argued that the arbitrator had exceeded his power

under Code of Civil Procedure sections 1286.2 and/or 1286.6¹ by: (1) Including Corio's profit margin in the award of damages, and (2) awarding prejudgment interest.

LivePerson renews each of these contentions on appeal.

II. DISCUSSION

A. *Standard of Review.*

"[A]n arbitrator's decision is not generally reviewable for errors of fact or law." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 6 (*Moncharsh*)). When, as here, the parties to a private arbitration proceeding have contracted to arbitrate disputes arising between them, they have agreed to exchange the reviewability of a trial judge's decision for a quicker, less expensive, but final award from an arbitrator. (*Id.* at pp. 8-10.) In so doing, they assume the risk that the arbitrator's decision will be legally or factually erroneous. (*Id.* at pp. 11-12.) Accordingly, private arbitration awards may only be reviewed when there is a statutory ground to vacate or amend the award. (*Id.* at p. 28.)

Sections 1286.2 and 1286.6 allow for review of an arbitration award if the arbitrator has exceeded the scope of his or her authority. Section 1286.2, subdivision (a)(4), provides that a reviewing court "shall" vacate an arbitration award if "The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." Similarly, an award not vacated under section 1286.2 may be amended under section 1286.6, subdivision (b), if "The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted."

Because the agreement between the parties to private arbitration determines the scope of an arbitrator's powers, the parties have bargained for the final resolution of all issues they submit to the arbitrator. (*Moncharsh, supra*, 3 Cal.4th at pp. 8-9.) Thus, when an arbitrator decides an issue within the scope of the parties' submission, the arbitrator acts within his or her powers as bargained for by the parties—even if the decision is wrong. (*Id.* at p. 28.)

¹ Unless otherwise noted all statutory references are to the Code of Civil Procedure.

On appeal, we independently review the trial court's decision to vacate, confirm, or correct an arbitration award, but we review the terms of the award itself deferentially. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376 & fn. 9 (*Advanced Micro Devices*).)

B. The Trial Court Correctly Confirmed the Arbitrator's Award to Corio, of All Monthly Fees Due Under the Parties' Software Hosting Agreement.

LivePerson does not request that the entire award to Corio should be vacated. Rather, it asks us to remand this matter to the arbitrator with instructions to reduce the award by the amount of Corio's "lost profits." Citing Paragraph 9.1 of the software hosting agreement which states in pertinent part that "IN NO EVENT SHALL EITHER PARTY . . . HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY LOST PROFITS," LivePerson argues that while Corio can recover its expenses, it cannot recover any portion of the monthly hosting fee that would have been sheer profit. LivePerson further contends that paragraph 9.1 limits the amount Corio can collect under paragraph 8.1, subdivision (a), which provides, in pertinent part, "If Customer fails to make any payment due hereunder, and fails to cure such breach within thirty (30) days after receiving written notice from Corio alerting Customer of the breach, then Corio may immediately and without further notice, terminate [the] Agreement and declare all sums due and to become due hereunder, immediately payable." Because the monthly hosting fees presumably include a profit, LivePerson contends that the arbitrator ignored an explicit limitation on his powers and that the trial court erred in confirming the award.

As a preliminary matter, we note that because the contract underlying this dispute specifies that "any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach of this Agreement, shall be settled by arbitration" the arbitrator's interpretation of this provision is final under *Moncharsh*. The parties' agreement explicitly grants the arbitrator the power to interpret paragraph 9.1; he cannot have exceeded his powers by deciding an issue the parties asked him to decide. (See *Moncharsh, supra*, 3 Cal.4th at p. 28; see also *Kahn v. Chetcuti* (2002) 101 Cal.App.4th

61, 66 [“The arbitrator did not ‘exceed his powers’ when he decided an issue he was clearly authorized [by the controlling arbitration agreement] to decide”].)

LivePerson relies on several post-*Moncharsh* cases for the proposition that a reviewing court may vacate or amend an arbitration award if it finds that the arbitrator interpreted the parties’ agreement in such a way as to essentially remake the contract between them. (See *Blue Cross of California v. Jones* (1993) 19 Cal.App.4th 220, 228-229 [arbitrators exceeded their power by ignoring the explicit financial limitation in the parties’ underlying contract]; *DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809, 1815 [arbitrator exceeded his powers by denying attorney fees to the prevailing party when the mandatory language of the contract compelled him to do so]; *O’Flaherty v. Belgium* (2004) 115 Cal.App.4th 1044, 1061 [by providing a remedy not authorized by California law, arbitrator applying a contract that forbade the award of any remedy “not available in a court of law” exceeded his powers].)

Advanced Micro Devices articulated the standard for “determin[ing] whether a contractual arbitrator has exceeded his or her powers in awarding relief for a breach of contract.” (*Advanced Micro Devices, supra*, 9 Cal.4th at p. 366.) It held that “in the absence of more specific restrictions in the arbitration agreement, the submission or the rules of arbitration, the remedy an arbitrator fashions does not exceed his or her powers if it bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator and to the breach of contract found, expressly or impliedly, by the arbitrator.” (*Id.* at p. 367.) As long as the remedy is related to “contractual terms as actually interpreted by the arbitrator (if the arbitrator has made that interpretation known), to an interpretation implied in the award itself, or to a plausible theory of the contract’s general subject matter, framework, or intent” (*id.* at p. 381), the award will be upheld.

LivePerson contends that the “rational relationship” standard articulated by *Advanced Micro Devices* does not apply, since Paragraph 9.1 of the parties’ agreement placed a “specific restriction” on the arbitrator’s authority. The appellants in *Moshonov v. Walsh* (2000) 22 Cal.4th 771 (*Moshonov*) unsuccessfully advanced a similar argument.

There, the buyer of a residential property brought several tort claims against the sellers. (*Id.* at pp. 773-774.) Although the real estate purchase agreement contained a provision mandating entitlement to reasonable attorney fees by the prevailing party “Should arbitration or suit be brought to enforce the terms of this contract or any obligation herein,” the arbitrator, reasoning that the provision authorizing the recovery of fees was not broad enough to cover “non-contractual claims,” made no attorney fees award. (*Id.* at p. 774.) The Court found unconvincing the appellant’s contention that the arbitrator had exceeded her powers by ignoring an explicit contractual provision (i.e. that the prevailing party “shall” recover fees). (*Id.* at pp. 777-779.) Instead, the court found that the arbitrator had interpreted the contract in such a way that the provision at issue did not limit her authority. (*Ibid.*) “Interpretation of the contract underlying this dispute being within the matter submitted to arbitration, such an interpretation could amount, at most, to an error of law on a submitted issue, which we have held is not in excess of the arbitrator’s powers within the meaning of sections 1286.2 and 1286.6. (*Moncharsh, supra*, 3 Cal.4th at p. 28.) The decision here thus did not violate ‘ “an express and explicit restriction on the arbitrator’s power.’ ” ’ (*Advanced Micro Devices, supra*, 9 Cal.4th at pp. 381-382.)” (*Moshonov, supra*, at p. 779.)

In the instant case, the arbitrator found that the language prohibiting recovery for lost profits was intended “to protect both parties from damage claims from third parties.” Even if we agreed with LivePerson’s contrary contention, we could not substitute our own interpretation of the relevant paragraphs for that of the arbitrator unless the arbitrator’s interpretation of the language amounted to a rewriting of the contract. (*Advanced Micro Devices, supra*, 9 Cal.4th at pp. 381-382 [arbitrators may not award remedies expressly forbidden by the parties’ contract].) Under *Advanced Micro Devices*, we consider the contract “as interpreted, expressly or impliedly, by the arbitrator” (*id.* at p. 367). Under *Moshonov*, we defer to the arbitrator’s interpretation of any alleged limitation on the scope of his powers. (*Moshonov, supra*, 22 Cal.4th at p. 779.) Because he found that the award of “damages, past and ‘to become due’ ” as “described in

paragraph 8.1” was not affected by paragraph 9.1, the remedy the arbitrator provided did not exceed his powers.

For the reasons stated above, the trial court correctly confirmed the arbitrator’s award of the total amount of monthly fees, including both profit margin and expenses, to Corio.

C. The Trial Court Correctly Confirmed the Arbitrator’s Award of Prejudgment Interest to Corio.

LivePerson also alleges that the trial court erred in confirming the award of prejudgment interest to Corio. LivePerson contends (1) to the extent to which the arbitrator awarded prejudgment interest under California law, he displayed an “outrageous disregard” for the law, thereby justifying vacatur or correction of that portion of the award, and (2) the arbitrator exceeded his powers to the extent to which he awarded interest under the rules of the AAA, since paragraph 11.6 of the parties’ contract specifies that “[the] Agreement shall be governed by and construed in accordance with the laws of the State of California”

In the final award, dated September 12, 2003, the arbitrator stated, “The law clearly calls for pre-judgment interest in the circumstances of this case” because “the amount in dispute was certain and known to LivePerson at the time Corio finally justifiably terminated the contract.” In support of this finding, the arbitrator specifically noted the letter sent by Corio to LivePerson on September 21, 2001; this letter notified LivePerson that Corio terminated all services under the parties’ hosting agreement and demanded “a minimum of approximately \$1,104,069 for past due amounts and minimum payment obligations.”

As with the damages claim we note that the interest award is final under the rule that an arbitrator does not exceed his powers if he decides an issue within the scope of the parties’ submission. (See *Moncharsh, supra*, 3 Cal.4th 1, 28.) The parties here not only submitted the issue of prejudgment interest; they even briefed it separately. Thus, the arbitrator’s decision on the contested issue of prejudgment interest may not be reviewed for errors of fact or law.

Moreover, if reviewed, the award of prejudgment interest to Corio would pass muster. Civil Code section 3287, subdivision (a) provides in relevant part “Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day.” (See also *Leff v. Gunter* (1983) 33 Cal.3d 508, 518-520; *Wisper Corp. v. California Commercial Bank* (1996) 49 Cal.App.4th 948, 962; *Children’s Hospital & Medical Center v. Bonta*’ (2002) 97 Cal.App.4th 740, 774.) In arguing that prejudgment interest cannot be awarded under California law, LivePerson renews its argument that paragraph 9.1 of the parties’ agreement limited Corio’s recovery to its expenses and claims that Corio’s damages were uncertain until its profit margin could be determined and subtracted from the monthly fees due under the parties’ agreement; the record indicates that this did not occur until the arbitration hearing, when the parties offered into evidence a breakdown of Corio’s expenses and profit margin on the LivePerson contract. However, the arbitrator explicitly found that paragraph 9.1 did not limit Corio’s damages to its expenses. He also noted that on September 21, 2001, Corio sent LivePerson a “precisely calculated demand for payment” of approximately \$1,104,069, which sum was comprised of past due amounts and amounts to become due under paragraph 8.1 of the hosting agreement.² Thus, Corio’s damages were certain at the time of breach, and prejudgment interest was properly awarded under California law.

Similarly unavailing is the fact that the arbitrator cited AAA rules as an additional basis for the award of prejudgment interest. An important difference exists between “ ‘the mode of decision and its reviewability are separate questions.’ ” (*Marsch v. Williams* (1994) 23 Cal.App.4th 238, 244.) The specification of a particular body of law does not alter the reviewability of an arbitration award. Thus, “[e]ven where an arbitration agreement requires the arbitrator to apply a particular law or body of law, ‘an

² In addition to the letter noted in the arbitration award, Corio also sent LivePerson five other letters warning that, if LivePerson continued to remain in default, it would terminate the contract and demand all payment under paragraph 8.1.

arbitrator's failure to apply such a law is not in excess of an arbitrator's powers within the meaning of [section 1286.2, subdivision (a)(4)].' ” (*Alexander v. Blue Cross of California* (2001) 88 Cal.App.4th 1082, 1090.) In any event, as we have observed, the award of prejudgment interest was a proper application of California law.

We find that the trial court properly confirmed the arbitration award. LivePerson has failed to show the existence of a statutory ground that would allow review of the arbitrator's decision.

III. DISPOSITION

The judgment is affirmed.

Kay, P.J.

We concur:

Reardon, J.

Sepulveda, J.